

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DIANNE KELLEY and KENNETH HANSEN,	)	No. C 07-475 MJP
	)	
Plaintiffs,	)	DECLARATION OF STEPHEN M.
v.	)	RUMMAGE IN OPPOSITION TO
	)	PLAINTIFFS' MOTION TO
MICROSOFT CORPORATION, a Washington	)	COMPEL DISCOVERY
corporation,	)	
	)	
Defendant.	)	

Stephen M. Rummage declares as follows:

1. **Identity of Declarant.** I am a partner in the law firm of Davis Wright Tremaine LLP. I am one of counsel of record for defendant Microsoft Corporation in this matter. I make this Declaration based on my personal knowledge and, where indicated, information provided by others.

2. **Rule 26(f) Conference.** On June 8, 2007, Charles Casper (another one of Microsoft's outside counsel) and I participated in a Rule 26(f) discovery planning conference with plaintiffs' counsel. Ultimately, as a result of that conference, the parties agreed on a Joint Status Report, which they filed with the Court on June 25, 2007. The Joint Status Report provides for phased discovery, with the first phase consisting of "discovery relating to the full and fair presentment of the class certification motion, including any merits discovery

1 that may be required to address the factors set forth in Rule 23.” Joint Status Report (Docket  
2 No. 21) at 3, ¶ 5(B). Plaintiffs’ counsel drafted the quoted language.

3 3. **Initial Disclosures.** Between the Rule 26(f) conference and the filing of the  
4 Joint Status Report, plaintiffs and Microsoft Corporation served their Initial Disclosures. I am  
5 attaching a true and correct copy of Microsoft’s Initial Disclosures as Exhibit A. We served  
6 the Initial Disclosures on plaintiffs’ counsel on June 18, 2007.

7 4. **Initial Discovery Requests.** About four weeks after the Rule 26(f) conference,  
8 on July 3, 2007, plaintiffs served their initial discovery requests. Their 100 Requests for  
9 Admission are attached to the Birk Declaration as Exhibit B, and Plaintiffs’ First Set of  
10 Interrogatories and Requests for Production of Documents are attached to the Birk  
11 Declaration as Exhibit C. In addition, plaintiffs on that same day served a Rule 30(b)(6)  
12 Deposition Notice, which set the deposition of Microsoft representatives for July 30, 2007,  
13 before any responses to plaintiffs’ discovery requests would be due. By agreement, the  
14 parties deferred that Rule 30(b)(6) deposition to August 29, 2007, to accommodate the  
15 summer vacation schedules of both counsel and the prospective witnesses.

16 5. **Second and Third Discovery Requests.** Plaintiffs served Second Discovery  
17 Requests on July 9, 2007, and Third Discovery Requests on July 13, 2007. The Second  
18 Discovery Requests are not at issue on this motion.

19 6. **Draft Protective Order.** As Microsoft worked on plaintiffs’ discovery, it  
20 became evident that plaintiffs were seeking documents that Microsoft regarded as  
21 confidential, as they related to the development and rollout of one of Microsoft’s core  
22 products. Accordingly, on August 1, 2007, my partner Cassandra Kinkead transmitted to  
23 plaintiffs’ counsel a draft protective order and advised that Microsoft would “need to get this  
24 entered (or at least agreed upon in principle) before we can produce any sensitive documents  
25 in this case.” Microsoft offered to “prepare an agreed motion” to facilitate entry of the  
26 Protective Order.

1           7.       ***Service of Microsoft's Discovery Responses.*** The next day, on August 2,  
 2 2007, Microsoft timely served its responses to plaintiffs' first round of discovery requests,  
 3 including responses and objections to all 100 of plaintiffs' Requests for Admission, as well as  
 4 responses and objections to plaintiffs' First Interrogatories and Requests for Production. In  
 5 part because plaintiffs had not responded to Ms. Kinkead's invitation to discuss a stipulated  
 6 Protective Order, however, Microsoft did not produce documents at that time.

7           8.       ***The Demand for a Rule 37 Conference.*** The following day, on August 3,  
 8 2007, plaintiffs' counsel emailed the correspondence attached hereto as Exhibit B, which  
 9 demanded a Rule 37 conference with respect to Microsoft's objections to plaintiffs' discovery  
 10 requests. The parties ultimately agreed to hold the Rule 37 conference on August 22, 2007.  
 11 Even though Mr. Wilner's August 3 letter rebuked Microsoft for not producing any  
 12 documents, Mr. Wilner did not at that time respond to the draft Protective Order that Ms.  
 13 Kinkead had forwarded on August 1.

14           9.       ***Plaintiffs' Response on the Protective Order.*** By the morning of August 7,  
 15 2007, we still had not heard from plaintiffs on the draft Protective Order. Accordingly, I  
 16 emailed Mr. Wilner as follows: "[W]e'd like to move the process forward by producing  
 17 responsive documents – but we have not yet heard from you on the proposed form of  
 18 protective order, which Cassi forwarded to you last Wednesday. Could you get back to us on  
 19 that, so we can address one of your concerns?" About 90 minutes after sending that email, I  
 20 received the letter attached hereto as Exhibit C, stating that plaintiffs preferred to address  
 21 requests for confidential treatment on a document-by-document basis.

22           10.      ***Efforts to Discuss a Protective Order.*** Over the next two days, I left at least  
 23 one voice mail with Mr. Wilner, asking for an opportunity to discuss the protective order  
 24 issues so document production could proceed. On Friday, August 10, 2007, shortly before I  
 25 was scheduled to leave town, I sent an email to Mr. Tilden noting that I had left a message for  
 26 Mr. Wilner "to discuss your side's refusal to stipulate to a protective order (so we can get  
 27

1 going on document production)” and explaining that “I am leaving at 11:30 today for a trip  
2 until Tuesday, and I’d like to get this ironed out immediately, so there’s no delay.” I received  
3 a return email from Mr. Thomas, which told me that lawyers at the Keller Rohrbach firm  
4 would “be handling the protective order issues, so you should talk to one of them.” Thus, ten  
5 days after providing a draft Protective Order, we still had not had any dialog with plaintiffs  
6 concerning the contents of the Protective Order and still had not produced documents.

7 11. ***Discussions to Resolve the Protective Order.*** Not long after receiving the  
8 email from Mr. Thomas on August 10, 2007, as I was walking out the door for the airport, I  
9 had a brief telephone discussion with Will Smart and Ian Birk of the Keller Rohrbach firm  
10 concerning the proposed Stipulated Protective Order. Messrs. Smart and Birk reiterated  
11 plaintiffs’ reluctance to enter into a Protective Order that would provide a framework for  
12 production of confidential material. They insisted that Microsoft produce documents  
13 immediately, subject to an interim agreement that they would keep the documents  
14 confidential; I responded that I did not believe we should begin production of confidential  
15 documents until we at least had a commitment from plaintiffs’ counsel that they would work  
16 with us on a framework to facilitate production of sensitive business material. Despite our  
17 disagreements, by the following week Mr. Birk provided a re-draft of the Protective Order,  
18 and plaintiffs agreed in writing to keep documents confidential pending resolution of the  
19 Protective Order issue. Microsoft therefore began producing documents on August 17, 2007.

20 12. ***Responses to Second and Third Discovery Requests.*** Microsoft served timely  
21 objections and responses to plaintiffs’ Second Discovery Requests on August 8, 2007, and to  
22 plaintiffs’ Third Discovery Requests on August 12, 2007. As before, Microsoft did not seek  
23 extensions of time to respond to either.

24 13. ***The Rule 37 Conference.*** Mr. Casper and I met with plaintiffs (Mr. Casper by  
25 telephone, me in person) on August 22, 2007, to discuss plaintiffs’ issues with Microsoft’s  
26 discovery responses. Plaintiffs did not precede that meeting with a phone call or a letter

1 outlining the issues they wanted to discuss. As the parties' subsequent exchange of  
 2 correspondence makes clear, plaintiffs raised a variety of matters beyond the scope of  
 3 Mr. Wilner's initial letter to me dated August 3, 2007, requesting the Rule 37 conference.

4       16. ***Time Needed for OEMs to Consent to Production.*** Before Microsoft began  
 5 producing documents, it came to the lawyers' attention that the OEM agreements that  
 6 plaintiffs had requested were the subject of non-disclosure agreements with the OEMs. As a  
 7 result, I told Mr. Birk that Microsoft would have to delay production of these documents  
 8 briefly to allow advance notice to each OEM before production, with sufficient time for the  
 9 OEM to intervene and object. I also told Mr. Birk that (a) I was advised the agreements were  
 10 all identical, and (b) we would be producing the form of the agreement, simply without the  
 11 identification of the OEM signatories. Mr. Birk never manifested any dissatisfaction with this  
 12 arrangement. Upon expiration of the notice period described in this paragraph, Microsoft on  
 13 September 7, 2007, produced to plaintiffs' counsel the OEM agreements for the top 18 OEMs.

14       17. ***Number of OEM Agreements Produced.*** I am informed and believe that  
 15 Microsoft has hundreds of agreements with OEMs. In November 2002, a Final Judgment was  
 16 entered in the U.S. District Court for the District of Columbia implementing Microsoft's and  
 17 the U.S. Department of Justice's agreement to resolve the United States' antitrust claims  
 18 asserted against Microsoft in the late 1990's. *See* Final Judgment, *United States of America v.*  
 19 *Microsoft Corp.*, No. 98-1232 (CKK) (D.D.C. Nov. 12, 2002) (attached hereto as Exhibit D).  
 20 The Final Judgment requires Microsoft to extend the same terms to all "Covered OEMs,"  
 21 defined as the 20 OEMs with the highest worldwide volumes: "Microsoft's provision of  
 22 Windows Operating System Products to Covered OEMs shall be pursuant to uniform license  
 23 agreements with uniform terms and conditions." *Id.* ¶ III.B at 2; *see* ¶ VI.D at 15 (defining  
 24 "Covered OEMs"). I am informed that Microsoft went beyond the Final Judgment's  
 25 requirements and extended uniform terms and conditions to all OEMs—not just the Covered  
 26 OEMs—so that in the years since the Final Judgment was implemented, Microsoft's OEM

1 Agreements are all the same. In light of this uniformity, it makes no sense for Microsoft to  
2 produce hundreds of copies of voluminous OEM agreements to plaintiffs here that are all the  
3 same. Accordingly, Microsoft produced 18 OEM agreements, in order to cover the top 10  
4 OEMs in all years at issue.

5 18. ***OEM Market Share.*** I am informed that computer industry analysts track and  
6 periodically report on OEM market shares. I have reviewed such a report from IDC, one of  
7 those analysts, which shows that the top ten OEMs accounted for 78% of PC sales in the U.S.  
8 in 2006. As explained above, Microsoft's production went far beyond this, since it covered  
9 18 OEMs overall. In short, the OEM agreements Microsoft produced to plaintiffs include  
10 those that made the vast majority of U.S. PC sales.

11 19. ***OEM Disclosures Regarding Windows Vista Capable Program.*** From my  
12 own research, I am aware that OEMs made disclosures concerning the meaning of the term  
13 "Windows Vista Capable." Indeed, in connection with my preparation of this declaration, I  
14 performed an Internet search for the phrase "Not all Windows Vista features are available for  
15 use on all Windows Vista Capable PCs," which yielded over 25,900 hits. I am attaching as  
16 Exhibit E results from that search and from searches performed in May and June, i.e., pages  
17 from the Web sites for Hewlett-Packard, Dell, Gateway and Acer, which illustrate some of the  
18 disclosures that OEMs made in connection with offering Windows Vista Capable PCs.

19 20. ***Marketing Materials Provided to Retailers.*** Microsoft's Responses to the  
20 Requests for Admission attached as Exhibit B to Mr. Birk's Declaration informed plaintiffs  
21 that "Microsoft did develop and make marketing materials available to retailers concerning  
22 the 'Windows Vista Capable' program, although Microsoft could not require retailers to use  
23 those materials." *See, e.g.*, Responses to RFAs 23-34. Although plaintiffs have never  
24 requested those marketing materials, Microsoft is preparing to produce a set to assist plaintiffs  
25 in understanding the scope of information available to PC purchasers. In anticipation of that  
26 production, I am attaching as Exhibit F a copy of a "Vista Capable Brochure" and a "Vista  
27

1 Capable Tent Card,” which we will be producing shortly and which, I am advised, Microsoft  
2 made available to retailers in connection with the Windows Vista Capable Program.

3 21. ***Features of Windows Vista Home Basic.*** In addition, Microsoft’s Web site  
4 describes the features of Windows Vista Home Basic, which plaintiffs allege their computers  
5 are capable of running. I am attaching as Exhibit G pages accessed through the Microsoft  
6 Web site describing the features of Windows Vista Home Basic that make it both easier and  
7 safer to use than prior operating systems.

8 22. ***Mullaney Sundlie Deposition.*** I am attaching hereto as Exhibit H a true and  
9 correct copy of excerpts of the deposition of Christine Mullaney Sundlie, one of the Rule  
10 30(b)(6) designees whom Microsoft produced for testimony on August 29, 2007.

11 I declare under penalty of perjury that the foregoing is true and correct.

12 EXECUTED this 10<sup>th</sup> day of September, 2007, at Seattle, Washington.

13 /s/ Stephen M. Rummage

14 Stephen M. Rummage, WSBA #11168

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2007, I electronically filed the foregoing Declaration of Stephen M. Rummage in Opposition to Plaintiffs' Motion to Compel Discovery with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 10<sup>th</sup> day of September, 2007.

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